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82-523

No._____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

SANGER BOATS, INC. and
TRAVELERS INSURANCE COMPANY,

Petitioners,

vs.

LAWRENCE SCHWABENLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether an injury sustained by a boat salesman while preparing for a "drag boat" race satisfies the status and situs requirements of the Longshoremen's and Harbor Workers' Compensation Act, so as to entitle said employee to Longshore and Harbor Workers' Compensation benefits?

Whether the Longshoremen's and Harbor Workers' Compensation Act covers those persons working in the recreational boat industry?

LIST OF PARTIES

Sanger Boats, Inc. *
Travelers Insurance Company
Lawrence Schwabenland
Director, Office of Workers' Compensation Programs, United States Department of Labor

* Sanger Boats, Inc. has no parent companies or affiliates, but it has a subsidiary, Stellings Propeller, Inc., a Division of Sanger Boats

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No._____

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner respectfully pray that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, No. 81-7064 and 81-7075, filed July 26, 1982, is reported at 683 F.2d 309. The opinion of the Benefits Review Board is reported at 13 BRBS 22. The opinion of the administrative law judge, dated April 20, 1979, is unreported.

JURISDICTION

The judgement of the Court of Appeals was entered July 26, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

33 U.S.C. 902(3)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and ship-breaker, but such term does not include a master or member of a

crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

STATEMENT OF THE CASE

This case arises out of a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq.

Lawrence Schwabenland began his employment with Sanger Boats, Inc. (Sanger) in 1968 and was in Sanger's employ at the time of his injury. Sanger is a manufacturer and seller of custom built, high performance, inboard engine recreational and racing boats; all production line boats, of which 75% were ski boats, weighed less than 3600 pounds.

Schwabenland was initially assigned to the shipping and receiving department, concerned primarily with sales and construction on the pleasure boat lines. After about two years, Schwabenland became

a boat salesman and manager. In this position Schwabenland's primary duties were to solicit and acquire orders for boats and other marine hardware. Incidental to each boat sale, because of the optional equipment and customizing ordered by each customer, Schwabenland overlooked the building of each boat to insure that all the options and customizing were included in the manufacture of the boat. Prior to delivery of each boat, Schwabenland inspected it for conformance with the customer's order and for any cosmetic defects; Schwabenland estimated that these visual inspections occupied 30% of his time. Any repairs or alterations needed were performed by other factory workers. Of the some 30 employees at the Sanger facilities, Schwabenland was the only salesman.

In addition to his sales duties, Schwabenland tested new production models

to determine their performance capabilities and also raced the employer's race boats at drag boat competitions sponsored by the National Drag Boat Association. He very seldom tested a boat prior to delivery. The purpose of the racing activities was to promote sales of Sanger manufactured boats. Schwabenland was engaged in this promotional activity between 25 to 30 times a year, mostly on weekends. Sanger had only two racing boats and Schwabenland was the only test/racing boat driver.

On July 29, 1973, in preparation for a major National Drag Boat Association event in Long Beach, California, Schwabenland was test driving a boat in the Oakland, California Estuary. The boat, Joker's Wild, was an 18-foot, six-inch, single seat, drag boat with a 426 cubic inch Chrysler engine and a weight of less than 2,000 pounds. After two or three trial runs in excess of 130 miles per hour,

the Joker's Wild flipped, causing injury to Schwabenland's left leg.

After each test run, the boat was lifted from the water, checked for fuel distribution and spark plugs, and then relaunched. Schwabenland did not assist in the launching nor did he perform engine repairs; occasionally, he did perform minor maintenance repairs.

The employer and insurance carrier disputed Schwabenland's claim for benefits as one not within the coverage under the Longshoremen's and Harbor Workers' Compensation Act (hereinafter the Act).

The claim was accordingly referred to an administrative law judge for hearing. In a Decision and Order filed April 20, 1979, the administrative law judge held that Schwabenland was not an employee under the Act as defined by 33 U.S.C. 902(3) and hence is not entitled to workers' compensation benefits under the

Act. The administrative law judge relied on the Benefits Review Board's Decision in Sedmak v. Perini North River Associates, 9 BRBS 378 (1978), wherein it was held that injury over navigable waters in and of itself is insufficient to determine the status of maritime employment and wherein the Benefits Review Board adopted the standard that, "a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3)." Sedmak, supra, P. 385. After examining Schwabenland's overall work activities, the administrative law judge found that Schwabenland was not a ship-builder, shipbreaker, or ship repairman, the three types of activity specifically set out in 33 U.S.C. 902(3) as being maritime employment, nor did Schwabenland's

activities bear a realistic and significant relationship to maritime activities. Concluding that Schwabenland's activities were typical of and or incidental to the occupation of boat salesman, the administrative law judge held that Schwabenland was not an eligible employee under the Act.

Pursuant to a Petition for Review filed by Schwabenland, the Benefits Review Board issued a Decision and Order, filed December 11, 1980, affirming the Decision of the administrative law judge. In that Decision, the Board concluded it was not necessary to determine whether Schwabenland's work constituted maritime employment, since there had not been a showing that those activities which arguably could be maritime in nature, specifically the testing of new boat designs and participation in weekend boat races, occupied a substantial portion of

Schwabenland's work time, and thus, outside the scope of 33 U.S.C. 902(3).

The Ninth Circuit Court of Appeals, in an Opinion filed on July 26, 1982, reversed the Decision of the Benefits Review Board. The Court of Appeals concluded that Schwabenland's duties to inspect boats for cosmetic defects, to test the design of new models, and to perform occasional maintenance in connection with the testing activities were sufficiently related to the construction of vessels to constitute maritime employment covered under the Act. In analysing the Board's substantial portion test, the Court of Appeals acknowledged that the Supreme Court has never directly addressed this concept; nevertheless, the Court of Appeals interpreted the Supreme Court's decision in Caputo as being contrary to the substantial portion test used by the Benefits Review Board. After rejecting the Board's

"substantial portion test," the Court of Appeals held that Schwabenland's regular performance of these "maritime" activities, even though they constituted less than a substantial portion of his overall working time, was sufficient to satisfy the status requirement of 33 U.S.C. 902(3).

The Court of Appeals has concluded that the Supreme Court interpreted that the Act does not exclude persons employed in the recreational boating industry, citing as its authority the case of Parker v. Motor Boat Sales, Inc., 314 U.S. 244, decided by this Honorable Court in 1941. Although the Court of Appeals has acknowledged that the Act has been substantially amended since the Parker decision, it stated that

> there is no indication that Congress, in amending the Act, intended to limit its coverage solely to claimants injured in connection with the non-recreational boat industry. Moreover, to impose the difficult

> requirement of determining which operations are commercial and which are recreational would seem to conflict with the goals of the 1972 amendments to provide uniform coverage and to eliminate jurisdictional problems. Ninth Circuit Court of Appeals Opinion, Appendix A, Page 16.

REASONS FOR GRANTING THE WRIT

I

We submit that by its decision, the Court of Appeals misapprehends the import of P.C. Pfeiffer Company, Inc. v. Ford, 11 BRBS 320, 444 U.S. 69 (1979) and Northeast Terminal Corporation, Inc. v. Caputo, 6 BRBS 150, 432 U.S. 249 (1977) and extends liability under the Act without regard to the nature of the industry in which the claimant was engaged at the time of injury and without regard to the status as well as the situs required by the Act.

This Court, in Pfeiffer and Caputo, set out the substantive requirement of

both status and situs as joint conditions of coverage and entitlement to benefits under the Act. To be eligible for compensation, a person must be an employee as defined by 33 U.S.C. §902(3) and sustain injury on the situs defined by 33 U.S.C. §903(a).

It is respectfully submitted that the Decision of the Ninth Circuit Court of Appeals, herein, fails to follow the requirements of the Supreme Court decisions in Pfeiffer and in Caputo in that it virtually eliminates the status requirement and as such cannot be reconciled with the prevailing interpretation of the Act as announced by this Honorable Court.

33 U.S.C. 902(3) restricts the scope of the Act's coverage by requiring that the injured worker must have been engaged in maritime employment. The term "maritime employment" contained therein, refers to the nature of the worker's activities.

P.C. Pfeiffer Company, Inc. v. Ford, supra, at Page 325.

As this court pointed out in Caputo, neither the Act nor its legislative history defines "maritime employment," making it difficult to determine whether an injured worker has satisfied the "status" requirement where, as in this case, the injured worker's activities are not of the type traditionally performed by longshoremen. Further, does a worker whose activities are only tangentially maritime in nature satisfy the status test; that is, how remote from traditional maritime activities must activites of an injured worker be before he fails the status test?

It is clear that 33 U.S.C. 902(3) was enacted to limit and restrict coverage under the Act to certain occupations. Inherent in this occupation requirement is the fact that workers engaged in certain occupations though arguably maritime

connected would not be engaged in maritime employment with Section 902(3). The term maritime employment in Section 902(3) has not been interpreted to include those occupations which are only remotely maritime related. This court recognized these limits as they pertain to longshoring activities in its decisions in Pfeiffer and Caputo.

It is respectfully submitted that the Ninth Circuit Court of Appeals, herein failed to consider these limitations of 33 U.S.C. 902(3) when it held that some of the activities Mr. Schwabenland performed as a boat salesman provided sufficient basis to find that he was engaged in maritime employment within Section 902(3). Such a holding vitually eliminates the status requirement and as such is contrary to this court's decisions in Pfeiffer and Caputo.

II

It is respectfully submitted that the Ninth Circuit Court of Appeals holding, herein, that the small recreational boat industry is covered by the Act is contrary to the intent, purpose, and legislative history of the Act.

The Act was enacted to provide compensation benefits to those workers involved in the loading, unloading, or the repairing of ships who would not be entitled to state workers' compensation benefits. The Congressional debates and the committee reports to the 1927 Act indicate Congress' attempts to limit the scope of the Act. Congress was acting to provide coverage only to those persons injured in the building or repairing of large commercial vessels. With the exception of an exchange between Representative Graham, Chairman of the House Committee that reported on the 1927 Act, and Representative Abernethy,

the legislative history refers exclusively to the commercial ship industry. That exchange proceeded as follows:

> Mr. Abernethy: As I understand the gentleman's interpretation of the bill, it does not include small repair yards.
>
> Mr. Graham: The gentleman spoke about the words in the fourth paragraph, 'including any dry dock'?
>
> Mr. Abernethy: Yes.
>
> Mr. Graham: And the gentleman was apprehensive that that might possibly cover a small ship yard. I can assure the gentleman that it will not. A dry dock is under admiralty, so declared in the decisions of the Supreme Court, and a dry dock is defined legally, so that it cannot include a shipyard.
>
> Mr. Abernethy: As I understand, this bill takes from its provisions seamen, fishermen, and oystermen, and does not include any shipyard or repairyard except a dry dock.
>
> Mr. Graham: That is correct.
>
> 68 Cong. Rec. 5403 (1927)

This exchange dispels any doubts that persons employed in the recreational boat

industry are not to be included within the scope of the Act.

A further manifestation of Congress' intent to limit the scope of the Act to commercial vessels appears in 33 U.S.C. 903(a)(1), wherein Congress specifically incorporated into the Act an "eighteen ton net exclusion." This exclusion precludes fishing vessels and other small boats from coverage under the Act.

Legislative history evidences no intent on the part of Congress to cover the small boat industry under the Act. 1972 amendments did nothing to alter that original intent. During the Congressional hearings on the 1972 amendments, not one piece of testimony was received from anyone associated with the small boat industry. This outright exclusion of the small boat industry from the hearings leads this petitioner to only one conclusion, that Congress did not consider or intend

workers in the small boat industry to be within the coverage of the Act.

The Court of Appeals, herein, based on this court's Decision in Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), concluded that, "the Supreme Court has implied that the Act does not exclude persons employed in the recreational boat industry." Ninth Circuit Court of Appeals Opinion, Appendix A, Page 15. This conclusion is clearly not consistent with the purpose and the legislative intent of the Act.

III

The Court of Appeals' finding that Mr. Schwabenland is an employee within 33 U.S.C. 902(3) and hence entitled to benefits under the Act does not comport with the express language of Section 902(3). Section 902(3) specifically states that the term employee for the purpose of the Act, "does not include a

master or member of a crew of any vessel."

It is undisputed that Mr. Schwabenland, at the time of his injury, was piloting a vessel in navigable waters, incurring injury when the vessel flipped over. Mr. Schwabenland was, therefore, both master and the crew of said vessel and as such, even though his employment could be characterized as maritime, the literal wording of the exception set forth under Section 902(3) precludes Mr. Schwabenland from recovering benefits under the Act.

Mr. Schwabenland, not being an "employee" as defined by 33 U.S.C. 902(3), is not entitled to compensation under the Act. Any and all remedies Mr. Schwabenland might have lies under the Jones Act, 46 U.S.C. 688.

The Court of Appeals refused to consider this vital issue, stating as its reason therefore: "On appeal, Sanger also

argues that Schwabenland, because he was 'the master or member of a crew' of a vessel, is not an employee under Section 2(3) of the Act, 33 U.S.C. 902(3). We need not consider this question because it was not raised before the Board." Ninth Circuit Court of Appeals, Opinion, Appendix A, Page 6.

We respectfully submit that the failure to raise this issue before should not and does not preclude a consideration of this issue by this Honorable Court. Since both the administrative law judge and the Benefits Review Board agreed that no coverage existed under the Act by virtue of the absence of status, the claim for benefits was dismissed. There is no reason to believe that had the issue of the Jones Act exclusion been raised it would have been addressed or determined by the initial trier of fact, the administrative law judge or the Benefits

Review Board. Failure therefore to raise this issue is moot in light of the chronology of the judicial and appellate process.

If for any reason this Honorable Court concludes that the decision of the administrative law judge must be annulled, we urge that the matter be referred to the Benefits Review Board to allow it to hear and decide all other issues relevant to their decision, including the exclusions set out in 33 U.S.C. 902(3).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted and the judgement to the Court of Appeals reversed.

Respectfully submitted,

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September 23, 1982

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE SCHWABENLAND and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Petitioners,	)	No. 81-7064 81-7075
v.	)	
SANGER BOATS and TRAVELERS INSURANCE COMPANY,	)	OPINION*
Respondents.	)	

Petition for Review of a Decision
of the Benefits Review Board
Argued and Submitted February 12, 1982

Before: CHOY, PREGERSON, and POOLE,
Circuit Judges.

CHOY, Circuit Judge:

Lawrence Schwabenland petitions for review of the Benefits Review Board's (the Board) denial of his claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.

* Filed July 26, 1982, Phillip B. Winberry Clerk, U.S. Court of Appeals

§§ 901-50 (the Act). Because the Board applied the wrong test for determining Schwabenland's employee "status" and because we are convinced that he meets the test we announced in Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir. 1975) cert. denied, 429 U.S. 868 (1976), we reverse and remand.

I

At the time of his injury, Schwabenland was employed as the sales manager for Sanger Boats (Sanger), a manufacturer and seller of custom-built, high-performance recreational and racing boats. He spent approximately 30 percent of his working time inspecting boats in various stages of production to ensure that they conformed to the buyers' specifications and were free from cosmetic defects. In addition to his sales and inspection duties, Schwabenland acted as

the primary test driver and pilot of new model boats (thereby participating in the development of the models), performed occasional maintenance on the boats, and participated in approximately 30 weekend races per year in which he drove Sanger's boats for promotional purposes. Schwabenland was injured on July 29, 1973 when the boat he was testing flipped over.

Sanger paid Schwabenland workers' compensation disability benefits under California law but Schwabenland claimed the higher compensation available under the Longshoreman's Act. Sanger and its workers' compensation insurer, Travelers Insurance Company (Travelers), contested his claim to benefits under the Act because they did not believe that he qualified as an "employee," a term defined by § 2(3) of the Act as a "person engaged in maritime employment." Schwabenland then

filed a claim for compensation with the United States Department of Labor.

Determining Schwabenland's "employee" status by reference to his "overall activities," an administrative law judge denied Schwabenland's claim for compensation under the Act. The judge ruled that Schwabenland did not fall within the class of covered employees because his employment did not have "a realistic significant relationship to the maritime activities involving navigation and commerce over navigable waters contemplated by Congress in amending the Federal Act."

On appeal, the Board also focused on Schwagenland's overall employment and held that a worker must spend a substantial amount of work time performing maritime duties in order to fall within the coverage of the Act. Thus, while Schwabenland's activities at the time of

the injury "were arguably maritime in nature," the Board considered it unnecessary to determine whether "this work constituted maritime employment since there is no evidence in the record that claimant's work testing and racing employer's boats occupied a substantial portion of his time."

Schwabenland asserts that the Board was incorrect in requiring that maritime activities occupy a "substantial portion" of his time and also argues that he satisfies the employee "status" test required for coverage under the Act. Sanger and Travelers dispute Schwabenland's "status" and argue that in enacting the Act, Congress never intended to cover the recreational-boat industry and, therefore, Schwabenland's injuries are not compensable under the Act. 1/

We will set aside the Board's decision only if it is unsupported by substantial evidence or is predicated upon an erroneous view of the law. Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs, 644 F.2d 827, 830 (9th Cir. 1981). In this case the facts are uncontroverted and the questions before this court are purely ones of law.

II

To be eligible for compensation under the Act, a claimant must sustain an injury

---

1. On appeal, Sanger also argues that Schwabenland, because he was "the master or member of a crew" of a vessel, is not an employee under § 2(3) of the Act, 33 U.S.C. §902(3). We need not consider this question because it was not raised before the Board. See Parker v. Motor Boat Sales, Inc. 314 U.S. 244, 251 (1941); Moore Dry Dock Co. v. Pillsbury, 169 F.2d 988, 991 (9th Cir. 1948).

within the "situs" defined by § 3(a) of the Act [2] and must have the "status" of an employee as defined by § 2(3). [3] It is not disputed that Schwabenland meets the situs requirement: his injury occurred on the Oakland Estuary, a navigable water

---

2. To satisfy the situs requirement, a claimant must sustain an injury upon

> the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 903(a)

3. To satisfy the status requirement, a claimant must be

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. § 902(3) (emphasis added).

of the United States. Thus, the main issue is whether Schwabenland's test-driving and boat inspection duties make him an "employee" i.e., a person "engaged in maritime employment," under § 2(3).

We have stated that for employment to be maritime, it "must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" Weyerhaeuser Co. v. Gilmore, 528 F.2d at 961 (quoting Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 272 (1972)). In Weyerhaeuser, we noted that "[t]he occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment; i.e., the perils of the sea and an unseaworthy vessel recognized under maritime laws." Id.

Using the Weyerhaeuser test, courts have held that the Act covers workers involved in construction related to maritime activities. See Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs, 644 F.2d at 830-31 (employee involved in construction of tie-up for incoming ships covered under Weyerhaeuser test); Odom Construction Co. v. United States Department of Labor, 622 F.2d 110, 113 (5th Cir. 1980) (land-based construction worker injured after moving concrete blocks used as tie-ups covered under Weyerhaeuser test), cert. denied, 450 U.S. 966 (1981); cf. Trotti & Thompson v. Crawford, 631 F.2d 1214, 1220-22 (5th Cir. 1980) (carpenter constructing pier engaged in maritime employment). Coverage has also been extended to work related to the construction of recreational boats. See Mississippi Coast Marine, Inc. v. Bosarge,

637 F.2d 994, 998 (carpenter working on 30-foot pleasure boat resting on blocks covered under Weyerhaeuser test), modified in part, 657 F.2d 665 (5th Cir. 1981). It is undisputed that Schwabenland conducted visual inspections of boats under construction to make certain that they were in compliance with the orders received. The inspection duties, the testing of new models to evaluate their design, and the performance of occasional maintenance in connection with the testing activities would seem to be sufficiently related to the construction of the vessels to constitute maritime employment covered under the Act.

The Board, however, determined Schwabenland's maritime-employee status by reference to his overall employment and found that Schwabenland had not spent a substantial portion of his work time

performing maritime duties. Consequently, the Board found that Schwabenland was not a maritime employee under the Act.

The Board's "substantial portion" test is a fairly-recent pronouncement. See Boudloche v. Howard Trucking Co., Inc., 11 BRBS 687, BRB No. 78-383 (1979), rev'd, 632 F.2d 1346 (5th Cir. 1980). Only two circuits have had the opportunity to examine the test and both have rejected it. See Graziano v. General Dynamics Corp., 663 F.2d 340, 343 (1st Cir. 1981); Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346, 1348 (5th Cir. 1980); cert. denied, 101 S. Ct. 3049 (1981).

The Supreme Court has never directly addressed the "substantial portion" test but is has said that the status requirement is satisfied as long as "some portion" of the employee's work time involves maritime activities. See Northeast Marine

Terminal Co., Inc. v. Caputo, 432 U.S. 249, 273 (1977) (employees who spend at least some of their time in indisputably longshoring operations are longshoremen under the Act). To substitute "substantial" for "some" would depart from the letter and the spirit of Caputo, see Boudloche v. Howard Trucking Co., Inc., 632 F.2d at 1348, and would be contrary to the Supreme Court's directive to take an expansive view of the coverage to give effect to the remedial purpose of the Act. See Northeast Marine Terminal, Co., Inc. v. Caputo, 432 U.S. at 268; Ramos v. Universal Dredging Corp., 653 F.2d 1353, 1358-59 (9th Cir. 1981).

We therefore reject the Board's "substantial portion" test. Because the facts are not disputed, we are able to determine whether Schwabenland was a maritime employee within the meaning of § 2(3).

We hold that Schwabenland's regular performance of maritime operations, even though it constituted less than a "substantial portion" of his overall working time, was sufficient to satisfy the status requirement of § 2(3). 4/

III

Sanger and Travelers attempt to limit the reach of the Act by contending that it was never meant to cover the small recreational-boat industry. They argue that the legislative history shows that Congress did not intend to include the industry within the benefited class covered.

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4. We need not decide whether Schwabenland should be able to recover because he was engaged in maritime employment at the moment of his injury. See Hullinghorst Industries v. Carroll, 650 F.2d 750, 754 (5th Cir. 1981), cert. denied, 102 S. Ct. 1037 (1982). We have previously rejected the "moment of injury" test when its adoption would have denied recovery. See Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 140 (9th Cir. 1978)

The only support cited for this contention, however, is a minor excerpt from a floor debate in the House of Representatives. 5/ We do not believe that the debate is helpful to the resolution of the issue.

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5. The following debate occurred on the floor of the House involving Mr. Graham, the Chairman of the House Judiciary Committee (which reported out the 1927 Act,) over the scope of pre-amendment § 3(a):

> Mr. Abernethy: As I understand the gentleman's interpretation of the bill, it does not include small repair yards.
>
> Mr. Graham: The gentleman spoke about the words in the fourth paragraph, "including any dry dock"?
>
> Mr. Abernethy: Yes.
>
> Mr. Graham: And the gentleman was apprehensive that that might possibly cover a small shipyard. I can assure the gentleman that it will not. A dry dock is under admirality, so declared in the decisions of the Supreme Court, and a dry dock is defined legally, so that it can not include a shipyard.
>
> . . . .
>
> Mr. Abernethy: As I understand, this bill takes from its provisions seamen,

The Supreme Court has implied that the Act does not exclude persons employed in the recreational-boat industry. In Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), the Court held that a janitor, employed by a small motorboat and outboard-motor supplier, was covered under the Act. The Court commented that the janitor had been engaged in a "clearly maritime activity" when he drowned after the 18-foot motorboat in which he was riding capsized while another employee was testing an outboard motor. Id. at 247. The type of vessel or the nature of the industry involved does not appear to have been significant.

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fishermen, and oystermen, and does not include any shipyard or repairyard except a dry dock.

Mr. Graham: That is correct.

68 Cong. Rec. 5403 (1927)

Although the Act has been substantially amended since the Parker decision, see the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat 1251, there is no indication that Congress, in amending the Act, intended to limit its coverage solely to claimants injured in connection with the nonrecreational-boat industry. Moreover, to impose the difficult requirement of determining which operations are commercial and which are recreational would seem to conflict with the goals of the 1972 amendments to provide uniform coverage and to eliminate jurisdictional problems.

The Fifth Circuit, the only circuit to have addressed this issue, has determined that the Act is applicable to recreational-boat builders. See Mississippi Coast Marine v. Bosarge, 637 F.2d at 996. The Board has likewise concluded that the

Act applies to the small recreational-boat industry. See Napoles v. Donzi Marine, Inc., 5 BRBS 685, 698, BRB No. 76-262 (April 6, 1977) (extending coverage to a manufacturer of small boats and pleasure crafts).

The Supreme Court's decision in Parker, the explicit statutory provisions of the Act, and the decision by the Fifth Circuit and the Board persuade us to reject Sanger's and Traveler's contention. We therefore hold that the small recreational-boat industry is covered by the Act.

The Board's decision is reversed and the case is remanded for proceedings consistent with this opinion.

REVERSED and REMANDED.

Appendix B

BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR

No. 79-314
& 79-314A

LAWRENCE SCHWABENLAND

Claimant-Petitioner

v.

SANGER BOATS

and

TRAVELERS INSURANCE COMPANY

Employer/Carrier-
Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Petitioner

DECISION AND ORDER*

Appeal from the Decision and Order of Joseph A. Matera, Administrative Law Judge, United States Department of Labor.

Richard C. Watters and David L. Simerly, (Miles, Sears and Eanni), Fresno, California, for the claimant.

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Albert H. Sennett (Hanna, Brophy, MacLean, McAleer and Jensen), San Francisco, California, for the employer/carrier.

Joshua T. Gillelan, II (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

These are appeals by claimant and the Director, Office of Workers' Compensation Programs, from the Decision and Order (78-LHCA-1118-S) of Administrative Law Judge Joseph A. Matera pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (hereinafter referred to as the Act).

In his decision, the administrative law judge held that claimant was not an

"employee," as defined in Section 2(3) of the Act, 33 U.S.C. §902(3), since his overall duties as sales manager lacked a significant relationship to maritime activities. Claimant and the Director appeal, arguing that claimant was engaged in maritime employment within the meaning of Section 2(3) of the Act. Oral argument in this case was held on January 29, 1980, in San Francisco, California. 1/

Claimant was employed as sales manager by Sanger Boats (hereinafter referred to as employer). Employer manufacturers high performance recreational and racing boats with a maximum weight of 3,600

1/ For purposes of oral argument, this case was consolidated with Ziemer v. The Stone Boat Yard, BRB No. 79-382 and Palmer v. Delta Marina Industries, BRB No. 79-293. However, the Decisions and Orders in these cases are being issued separately.

pounds. Claimant was responsible for the acquisition of new orders for boats. While testing the racing boat Joker's Wild on a weekend racing trip, he was injured when the boat flipped over in the Oakland Estuary.

In order to be covered by the Act, claimant must show that he was an employee as defined in Section 2(3), 33 U.S.C. §902(3), and that he was injured on a situs covered by Section 3(a). 33 U.S.C. §903(a). Claimant was injured in the Oakland Estuary, a body of navigable water and clearly a covered situs under Section 3(a). The sole issue therefore is whether claimant was a maritime employee as defined in Section 2(3). 2/

2/ Section 2(3) provides as follows:

> The term "employee" means any person engaged in maritime employment, including any long-

The Director contends that claimant's work with small, recreational vessels of under 3,600 pounds was clearly maritime in nature. The administrative law judge's denial of benefits was not based on his interpreting the Act as excluding work in connection with such vessels. However, the argument that the size of a vessel may be dispositive of coverage goes to the heart of the Board's subject matter jurisdiction and must, therefore, be considered. See Ramos v. Universal Dredging Corp., 10 BRBS 368, BRB Nos. 78-466/A (1979).

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shoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The Act does not contain an express exemption from coverage for persons whose work involves vessels of a certain size or use. 3/ However, in listing the occupations specifically covered by Section 2(3), Congress referred to ship repairmen, shipbuilders, and ship-breakers rather than persons involved with boats or vessels. Therefore, it must be determined whether use of the word "ship" excludes vessels similar to the small, recreational boats with which claimant worked.

In Napoles v. Donzi Marine, Inc., 5 BRBS 685, BRB No. 76-262 (1977), the

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3/ Section 2(3) contains an express exemption for all persons engaged by the master to load, unload or repair any vessel under 18 tons net. This exclusion is not applicable herein as claimant was neither engaged by the master nor was he involved in loading, unloading, or repairing any vessel. See Fuduli v. Maresca Boatyard, 7 BRBS 982, BRB No. 77-335 (1978).

Board considered various constructions of the terms "ship," "boat," and "vessel," and concluded that it was impossible to distinguish a "ship" from a "boat" or "vessel" based on size or other factors. 4/ The Board found that the technical definition in U.S. v. Kelly, 26 Fed. Cas. 697 (D.C. Mass. 1863), describes a ship as a three-masted vessel navigated with sails. However, in a generic sense, a ship is any seagoing craft larger than an undecked boat. The Board also found that a "boat" is often defined as a "small open

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4/ The word "vessel" also appears in Section 2(3) as well as the legislative history. See H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972); S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972). However, the Board has held that the principle of ejusdem generis requires that the work "vessel" refer to classes of ships and not to every class of vessel since the word "ship" appears first in Section 2(3). Napoles v. Donzi Marine, Inc., 5 BRBS 685, BRB No. 76-262 (1977).

vessel or watercraft, usually moved by oars or by rowing," while the term "vessel" in its broadest sense generally includes "any description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water." Napoles, 5 BRBS at 692, 693. Based on these definitions, the Board determined that the word "ship" could not be defined with sufficient specificity to be used as a means of excluding certain types of watercraft. Therefore, the Board held that neither the size of a vessel nor its designation as a ship, boat or otherwise was determinative in ascertaining the scope of Section 2(3) of the Act.

In admiralty cases, courts often construe the term "ship" to include all navigable structures intended for transportation, other than boats belonging to

other vessels. See Cope v. Vallette Dry Dock Co., 119 U.S. 625 (1887); Perry v. Haines (The Robert W. Parsons), 191 U.S. 17 (1903). In Perry v. Haines, the Supreme Court held Erie Canal barges, called canal "boats," covered as ships or vessels within the admiralty jurisdiction. Stating that maritime jurisdiction turns on the purpose for which the vessel is built rather than its size or form, the court cited cases where jurisdiction was based on navigability of the vessel, including coverage of a fishing boat only 24 feet long.

A number of vessels not involved in trade or commerce, including recreational boats, have been held covered by admiralty jurisdiction. See London Guarantee and Accident Co. v. Industrial Accident Commission, 279 U.S. 109 (1929); Continental Insurance Co. v. Clayton Hardtop Skiff

No. NJ 2281 B (The Skipton), 367 F.2d 230 (3d Cir. 1966); Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976); Oppen v. Aetna Insurance Co., 485 F.2d 252 (9th Cir. 1973). Moreover, in cases under the Act, both before and after the 1972 amendments, the Board and the courts have held the builders and repairmen of numerous vessels covered even though those vessels could not meet a technical or traditional definition of "ship." See Parker v. Motor Boat Sales, 314 U.S. 244 (1941) (18-foot motorboat); Dravo Corp. v. Maxim, 545 F.2d 374 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977) (barge); Continental Casualty v. Lawson, 64 F.2d 802 (5th Cir. 1933) (five-ton tug); Ward v. Newport News Shipbuilding and Dry Dock Co., 8 BRBS 353, BRB No. 77-718 (1978) (submarine). Thus, case law construing the term "ship" does not limit the use of

the term to vessels of a certain size or use.

The legislative history of the Act provides little guidance in interpreting the scope of Section 2(3) insofar as small or recreational boats are concerned. These vessels are not specifically mentioned in either the Act or the official committee reports. Boating associations representing the recreational boating industry did not testify or otherwise participate in the legislative process in either 1927 or in 1972. However, as the Board noted in Napoles, supra, while failure to include recreational boating within the scope of the hearings lends support to the argument that such boating is not within the jurisdiction of the Act, the lack of representation at the hearings and lack of comment or reference to recreational boating is insufficient to

remove the industry from coverage, especially if the language of the Act and legislative intent indicate otherwise. The only indication that those involved with small boats were to be excluded from the original Act occurred in floor debate involving Mr. Graham, Chairman of the House Judiciary Committee, which reported out the 1927 Act. However, this discussion involved the scope of coverage under pre-amendment Section 3(a). 5/ Therefore, this discussion is not helpful in ascertaining the scope of Section 2(3).

5/ This exchange was as follows:

> Mr. Abernethy. As I understand the gentleman's interpretation of the bill, it does not include small repair yards.
>
> Mr. Graham. The gentleman spoke about the words in the fourth paragraph, 'including any dry dock'?
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> Mr. Abernethy. Yes.

Furthermore, employees injured on small recreational boats were covered by the pre-amendment Act so long as the Act's situs requirement was met. For example, in Parker v. Motorboat Sales, Inc., 314 U.S. 244 (1941), the Supreme Court found coverage where a janitor employed by a manufacturer of recreational boats was killed while riding in an 18-foot

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> Mr. Graham. And the gentleman was apprehensive that that might possibly cover a small ship yard. I can assure gentleman that it will not. A dry dock is under admiralty, so declared in the decisions of the Supreme Court, and a dry dock is defined legally, so that it cannot include a shipyard.
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> Mr. Abernethy. As I understand, this bill takes from its provisions seamen, fishermen, and oystermen, and does not include any shipyard or repairyard except a dry dock.
>
> Mr. Graham. That is correct

68 Cong. Rec. 5403 (1927).

motorboat on navigable waters. The Court concluded that claimant's riding in the boat was "clearly maritime activity." 314 U.S. at 227. Thus, the pre-amendment Act did not exclude persons injured on small or recreational vessels.

While the 1972 amendments made significant changes in coverage under the Act, the amendments did not limit the Act's coverage to claimants injured in connection with large, commercial vessels. The legislative history indicates that the purpose in amending Section 2(3) was to eliminate the shifting coverage resulting from the emphasis on whether the injury occurred on land or water. These changes involved the addition of the "maritime" employment requirement to Section 2(3) as well as expanding the situs requirement in Section 3(a). In adopting these changes, Congress gave no indication that coverage

under the Act was to be restricted to employees working with vessels of a certain size or use. Considering the broad interpretations in case law of the terms "ship" and "vessel," the terms used in the legislative history as well as in the Act, I cannot conclude that Congress selected that language to exclude claimants working with a certain type of ship or vessel. Absent a more specific expression of congressional intent to exclude these employees, I must conclude that Congress did not intend to do so.

Accordingly, I agree with the Board's reasoning in Napoles v. Donzi Marine, Inc., that neither size of a vessel nor its designation as a ship, boat or otherwise can have any impact upon coverage under the Act. However, in Napoles the Board further held that "shipbuilding involves all operations necessary to build a ship or

vessel when at least part of that construction takes place over navigable waters or on a dry dock." 5 BRBS at 698. I agree that shipbuilding involves all operations necessary to build a ship or vessel; however, I cannot agree that part of that construction must take place over navigable waters or on a dry dock. This holding requires reading pre-amendment situs requirements into Section 2(3) of the Act, a result which I do not believe is the correct interpretation of Section 2(3). In P.C. Pfeiffer Co., Inc. v. Ford, 44 U.S. 69 (1979), the Supreme Court emphasized that Section 2(3) of the Act contains occupational and not geographical requirements for maritime employment. Claimant's status as a shipbuilder under Section 2(3) thus requires an examination of his duties and their relationship to vessel construction and is not affected by whether his

employer has employees who work on navigable waters or dry docks.

Furthermore, the analysis of the Board in Napoles shifts the emphasis from determining the status of the employee under Section 2(3) to examining the nature of an employer's business and evaluating employer's status as a maritime employer under Section 2(4), 33 U.S.C. §902(4). 6/ This approach differs from the approach usually followed by the Board and courts. Generally, if a claimant is engaged in maritime employment within the meaning of Section 2(3), claimant's employer is automatically a maritime employer as defined by Section 2(4). See Handcor, Inc. v. Director, OWCP, 568 F.2d 143, 7 BRBS 413

6/ Section 2(4) provides that an "employer" is "an employer any of whose employees are employed in maritime employment" upon a situs listed in Section 3(a).

(9th Cir. 1978); Perez v. Sea-Land Service, Inc., 8 BRBS 130, BRB Nos. 77-274/A (1978). I continue to believe that this is the correct approach. Thus, a claimant is engaged in shipbuilding when his duties involve the construction of a vessel, regardless of its size or use. If claimant is engaged in shipbuilding, then employer is a statutory "employer" within the meaning of Section 2(4).

However, even if employees working with small recreational vessels are not ship repairmen, shipbuilders or shipbreakers, such claimants may nonetheless fall within the general category of "maritime employment" as defined in Sedmak v. Perini North River Associates, 9 BRBS 378, BRB No. 77-896, et al. (1978), aff'd sub nom. Fusco v. Perini North River Associates, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980). 7/ In Sedmak, the Board

held that "a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3)." 9 BRBS at 386. In adopting this definition of maritime employment, the Board rejected in part the definition of maritime employment promulgated in Weyerhaeuser v. Gilmore, 528 F.2d 957, 3 BRBS 140 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976), insofar as it required that claimant's employment have a relationship to "traditional" maritime activities. We found that this requirement as well as the requirement that employment relate to the "traditional work

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7/ It is clear that Section 2(3) does not enumerate all possible types of maritime employment. See P.C. Pfeiffer Co., Inc. v. Ford, at note 7.

and duties of a ship's service employment" was unduly restrictive, particularly in light of the more recent Supreme Court decision in Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977), and the Ninth Circuit's approach to issues under Section 2(3) following that decision. See Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978); Handcor, Inc. v. Director, OWCP, 568 F.2d 143, 7 BRBS 413 (9th Cir. 1978). Thus, the scope of maritime employment under the Sedmak definition is not limited to activities traditionally related to a ship's service.

It is apparent that small recreational boats are involved in navigation regardless of their size or use. However, the Sedmak definition of maritime employment refers to maritime activities involving navigation and commerce. The phrase "navigation

and commerce" was originally derived from Justice Story's opinion in Delovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815), which refers to "contracts relating to navigation, business or commerce of the sea." See Gilmore and Black, The Law of Admiralty, 2d edition, 21. The conjunctions "and" and "or" are often used interchangeably by the courts when referring to the nexus to navigation and/or commerce. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); Chapman v. City of Grosse Point Farms, 385 F.2d 962 (6th Cir. 1967). Thus, the definition does not require that activities have a nexus to both navigation and commerce in order to be maritime in nature.

In determining whether activities are maritime in nature for the purposes of admiralty jurisdiction, vessels used for noncommercial purposes have not been

excluded. In Campbell v. Loznicka (The Scorpio), 181 F.2d 356 (5th Cir. 1950), the Fifth Circuit held that a person furnishing repairs on the order of the owner of a contrivance which could be used for navigation had a maritime lien enforceable in admiralty. The Ninth Circuit held that the claims of private pleasure craft owners for damage from an oil spill sounded in maritime tort. Oppen v. Aetna Insurance Co., 485 F.2d 252 (9th Cir. 1973). The extension of admiralty jurisdiction to the operation of small pleasure craft engaged in noncommercial nafigation was before the Eighth Circuit in St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974). Applying Executive Jet, the court rejected petitioner's argument that traditional maritime activity was limited to commercial activity and held that operation of an 18-foot motorboat was

within the admiralty jurisdiction.

Moreover, excluding vessels used for noncommercial purposes also raises difficulties in determining what constitutes a commercial or noncommercial use. Commercial vessels in a traditional sense are trading ships used for tranportation of goods by sea. While vessels built for recreational purposes generally fall outside this category and may therefore be considered noncommercial, others are less easy to classify. Some water craft built ostensibly for recreational use are actually used for business purposes as, for example, carriage of passengers for hire, which has been held to be a commercial use. See London Guaranty and Accident Co. v. Industrial Accident Commission, supra. Other vessels such as tugboats, submarines and fishing boats, also cannot be easily classified since they are neither used in

traditional commercial trade nor used in recreational activities. Classifying vessels by use thus would create a variety of problems in defining coverage under the Act.

In addition, the exclusion of employees who work with small or recreational boats based on technical distinctions between types of vessels would not be consistent with the often cited principle that "the Act must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results." Voris v. Eikel, 346 U.S. 328 (1953). A provision excluding boats of a certain size or use was not included in the Act itself or mentioned by Congress in enacting either the original legislation or the 1972 amendments. Such an exclusion restricts the scope of this remedial legislation intended to be broadly

construed. Therefore, an exclusion for small or recreational boats cannot be read into Section 2(3).

Therefore, I conclude that the fact that claimant worked on small, recreational vessels does not exclude him from the coverage of Section 2(3).

To determine whether claimant was covered, it is necessary to examine his duties at Sanger Boat. Claimant and the Director, relying on Parker v. Motorboat Sales, Inc., supra, contend that claimant's duties in testing and development of vessels constituted maritime employment. In Parker, the Supreme Court held that an employee who drowned while riding on a navigable river testing an outboard motor was covered by the Act. The court found that the fact that decedent was a janitor and therefore predominantly a non-maritime employee did not "alter the fact that at

the time of the accident, he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made." 314 U.S. at 247. However, the Parker case was decided before the 1972 Amendments to the Act. In Sedmak, the Board found that pre-amendment case law is not controlling in post-amendment cases, but serves only as a useful framework in which to ascertain maritime employment. 8/ Thus, Parker is not determinative of claimant's status as a maritime employee. 9/

8/ The Ninth Circuit Court of Appeals has indicated that it will no longer follow pre-amendment decisions as the court has concluded that the 1972 amendments "radically changed the basis for an employee's entitlement to federal compensation." Weyerhaeuser Co. v. Gilmore, 528 F.2d at 960.

9/ The fact that claimant was injured upon navigable waters and would have been covered pre-amendment under such precedents as Parker is also an insufficient basis for finding coverage under the amended Act. See Sedmak, 9 BRBS at 385.

Moreover, claimant's work testing the boat Joker's Wild at the time of injury is not dispositive of coverage under Section 2(3). In determining whether claimant's duties constitute employment covered by the Act, we must examine his overall employment rather than his duties at the time when the injury occurred. See Boudloche v. Howard Trucking Co., Inc., 11 BRBS 687, BRB No. 78-383 (1979); Howard v. Rebel Well Service, 11 BRBS 568, BRB No. 78-502 (1979). Under the standard enunciated in Boudloche and Howard, claimant msut spend a substantial portion of his time preforming duties which are maritime in nature in order to be covered by the Act. Thus, claimant's overall duties must constitute either shipbuilding or "maritime employment" as defined in Sedmak in order for claimant to be covered.

Claimant, in the instant case,

performed no actual construction work on the boats manufactured by employer. Hearing Transcript at 26. He was employed as a salesman, performing duties involving the promotion and sale of employer's boats. Claimant testified that he spent 30 percent of his time inspecting boats in order to insure that they were manufactured in accordance with a customer's order. Claimant was also involved in testing and developing new vessels for possible future construction. Hearing Transcript at 37, 38. Claimant and Director argue that this work constituted an integral part of the construction process. However, the administrative law judge found that claimant's work inspecting boats was incidental to his employment as sales manager and therefore did not constitute shipbuilding. The administrative law judge also held that testing was not a part of vessel construc-

tion. He based this conclusion upon a footnote in the Board's decision in Napoles which stated, "We do not consider the testing of the boat by an employee of the employer to be a part of vessel construction." 5 BRBS at 699.

I agree that claimant's testing and inspection duties cannot be considered an integral part of the construction of a vessel. 10/ Claimant inspected boats under construction to ascertain that the boat contained the proper equipment as ordered by the customer, that it was the proper color and that there were no cosmetic defects on the hull. These duties cannot be considered a part of preparing a vessel for use upon navigable waters; rather, they were incidental to his

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10/ It is clear that his duties driving employer's racing boats, discussed infra, bore no relation to vessel construction.

employment as sales manager. I also do not believe that claimant's testing activities can be considered as an integral part of shipbuilding. Claimant was not involved in testing completed vessels for final adjustment before delivery to a customer. Rather, he evaluated prototypes for future boat designs. This work was not related to and cannot be considered an integral part of the construction of a vessel. Claimant lacked the direct involvement with shipbuilding which has been found in cases where employees have been held covered by the Act as shipbuilders. See Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976); vacated and remanded, 433 U.S. 904 (1977), reaff'd. 575 F.2d 79 (5th Cir. 1978), cert. denied sub nom. Director, OWCP v. Jacksonville Shipyards, Inc., 440 U.S. 967 (1979).

However, although claimant was not employed as a shipbuilder, he may nonetheless be covered if his employment is within the Sedmak definition of maritime employment, which requires a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." 9 BRBS at 386. In the instant case, claimant's overall duties were directed toward the sale and promotion of the boats manufactured by employer. His work inspecting new boats was part of his sales job. Thus, the only duties her performed which were arguably maritime in nature were testing and evaluating new models of vessels for future construction and driving employer's racing boats in weekend races for purposes of promoting sales. 11/

11/ These races took place on weekends during a six to seven month period each year.

In connection with these racing activities, claimant also occasionally performed general maintenance work. Although not a part of vessel construction, these activities occupied some of claimant's time and were arguably maritime in nature. However, it is not necessary to determine whether this work constituted maritime employment since there is no evidence in the record that claimant's work testing and racing employer's boats occupied a substantial portion of his time. Therefore, this work cannot qualify him for coverage as a maritime employee within Section 2(3) of the Act.

Therefore, although claimant's work with recreational boats weighing 3,600 pounds and less does not exclude him from the Act's coverage, his overall employment as sales manager places him outside the scope of Section 2(3) of the Act.

Accordingly, the Decision and Order of the administrative law judge denying claimant benefits is affirmed.

SO ORDERED.

ISMENE M. KALARIS
Administrative Appeals Judge

SMITH, Chief Administrative Appeals Judge, concurring:

I agree with my colleague that claimant's overall employment as a salesman places him outside the scope of the Longshoremen's and Harbor Workers' Compensation Act. Therefore, I concur in her affirmance of the administrative law judge's denial of benefits to claimant. I believe, however, that there is an additional basis upon which to deny coverage. Unlike Judge Kalaris, I am persuaded by the legislative history of the Act that Congress never intended coverage for those

persons who work with small, non-commercial vessels.

The Longshoremen's and Harbor Worker's Compensation Act was enacted to provide compensation benefits to those workers involved in the loading, unloading or repairing of ships who would not otherwise be entitled to state workers' compensation benefits. The legislative history of the Act evidences no intent on the part of Congress that members of the small boat industry be included within the benefited class.

It is apparent from the Congressional debates and the Committee Reports to the 1927 Act that the concern of Congress at that time was of a very limited nature. In short, Congress was acting to provide coverage only to those persons injured in the building or repairing of large commercial vessels. The Act's draftsmen

and enactors and the many witnesses who testified before Congress referred exclusively, with one exception, to the commercial ship industry. The one exception took the form of the following exchange between Representative Graham, Chairman of the House Committee that reported out the 1927 Act, and Representative Abernethy in which the former dispelled any doubt that small boat workers were not to be included within the scope of the Act:

> Mr. Abernethy: As I understand the gentleman's interpretation of the bill, it does not include small repair yards.
>
> Mr. Graham: The gentleman spoke about the words in the fourth paragraph, 'including any dry dock'?
>
> Mr. Abernethy: Yes.
>
> Mr. Graham: And the gentleman was apprehensive that that might possibly cover a small shipyard. I can assure the gentleman that it will not. A dry dock is under admiralty, so declared in the decisions of the Supreme Court, and dry dock is defined legally,

> so that it cannot include a shipyard.
>
> Mr. Abernethy: As I understand, this bill takes from its provisions seamen, fishermen, and oystermen, and does not include any shipyard or repairyard except a dry dock.
>
> Mr. Graham: That is correct.

68 Congressional Record 5403 (1927)

Congress, in further manifestation of its intent to address only the needs of workers in the longshore and ship industry, specifically incorporated into the Act an "eighteen ton net" exclusion. Found in Section 3(a)(1), 33 U.S.C. §903(a)(1), the exception was directed at excluding fishing vessels and other small craft.

That the Pre-Amendment Act was not meant to cover any person injured on small or recreational boats is therefore clear. Equally as clear is the fact that the 1972 Amendments did nothing to alter that original design. During the hearings on the

1972 Amendments Congress heard from such interest groups as the New York Shipping Association, the Shipbuilders Council of America, and the International Longshoremen Workers Union. Not a single word of testimony was received, however, from anyone associated with the small boat industry - a fact that leads inescapably to the conclusion that Congress did not consider or intend that class of workers to be within the Act's coverage.

Therefore, I would find claimant not to be an employee for purposes of the Longshoremen's and Harbor Worker's Compensation Act irrespective of his overall employment by Sanger Boats as a sales manager.

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

MILLER, Administrative Appeals Judge, dissenting:

Because I would hold claimant is a "maritime employee" under Section 2(3) of the Act, I must dissent from my colleagues' denial of benefits in this case. The fact that claimant was injured in the course of his employment over "navigable waters" as that term was understood prior to the 1972 Amendments to the Act is sufficient to warrant coverage under the Act as I have explained in my dissenting opinions to the line of cases including Churchill v. Perini North River Associates, BRBS, BRB Nos. 79-113/A et al. (Oct. 31, 1980), Miller v. Central Dispatch, Inc., BRBS, BRB Nos. 78-467/A & 79-655/A (Sept. 26, 1980), Gilliam v. Wiley N. Jackson, Co., 12 BRBS 556, BRB Nos. 79-388/A (1980), Boudloche v. Howard Trucking Co., Inc., 11 BRBS 687, BRB No. 78-383 (1979), and Sedmak v. Perini North River Associates, 9 BRBS 378, BRB Nos. 77-896 et al. (1978),

rev'd sub nom. Fusco v. Perini North River Associates, 601 F.2d 659 (2d Cir.), vacated and remanded mem., 100 S.Ct. 697 (1979), aff'd, 622 F.2d 1111 (2d Cir. 1980). For an extensive discussion of the rationale behind this rule, see also Stewart v. Brown & Root, Inc., 7 BRBS 356, BRB No. 76-451 (1978) (Miller responsible), which was leter overruled by a majority of this Board in Sedmak, from which I dissented.

This case, therefore, is controlled by the Supreme Court's decision in Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), where an employee whose primary duties were those of a janitor and porter was found to be involved in "clearly maritime activity" while riding in a small boat on navigable waters testing an outboard motor. The Supreme Court found that the employee, who was "predominantly a non-maritime employee," was covered under

the provisions of the Act.

It is beyond dispute that this claimant would have been covered under Parker had he been injured prior to the enactment of the 1972 Amendments to the Act, amendments which were described by the Supreme Court as follows: "In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act, (LHWCA 33 U.S.C. §901 et seq., in substantial part to 'extend [the Act's] coverage to protect additional workers." S. Rep. No. 92-1125, 92d Cong., 2d Sess., 1 (1972)." Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, , 6 BRBS 150 (1977). It stretches the imagination to conclude that such an extension would deny coverage to a substantial portion of those employees already covered prior to the 1972 Amendments.

Furthermore, as to the question of whether claimant's "regular" duties mili-

tate against coverage when he was injured while actually engaging in maritime employment, Parker is again controlling. The Supreme Court specifically took note of the fact that the claimant in Parker was

> hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made. Cf. Northern Coal Co. v. Strand, 278 U.S. 142, 144, 49 S.Ct. 88, 73 L.Ed. 232; Employer's Liability Assurance Corp. v. Cook, 281 U.S. 233, 236, 50 S.Ct. 308, 309, 74 L.Ed. 823. Moreover, Section 2(4) of the Act, 33 U.S.C.A. §902(4), expressly provides for its application to 'employees [who] are employed *** in whole or in part, upon the navigable waters of the United States.'

314 U.S. at 247 (footnote omitted)(emphasis in original). As I noted in my dissenting opinions in Churchill, Miller, Gilliam,

Boudlache, Howard v. Rebel Well Service, 11 BRBS 568, BRB No. 78-502 (1979), and Sedmak, an employee's usual duties are irrelevant for the purpose of determining coverage under the Act if his injury occurred while he was actually engaging in maritime employment. It is incomprehensible as to how my colleagues can adopt tests which would exclude this claimant and yet remain true to the Supreme Court's directive that the "Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." Voris v. Eikel, 346 U.S. 328, 338 (1953). I fail to see how a liberal construction of the Act is achieved when a "substantial portion" test is used to deny benefits to a claimant working over navigable waters, nor can I fathom a more harsh and incongruous result than the denial of benefits to a

claimant who unquestionably would have been covered under the pre-1972 Amendments of the Act. I dissent.

JULIUS MILLER
Administrative Appeals Judge

Dated this 11th
day of December 1980

Appendix C

U.S. DEPARTMENT OF LABOR
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Suite 600-211 Main Street
San Francisco, California 94105
CASE NO. 78-LHCA-1118-S
OWCP NO. 13-39266

In the Matter of

LAWRENCE SCHWABENLAND

Claimant

vs.

SANGER BOATS

Employer

THE TRAVELERS INSURANCE COMPANY

Carrier

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Before: JOSEPH A. MATERA
Administrative Law Judge

DECISION AND ORDER

Jurisdictional and Procedural History

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq. (hereinafter referred to as the Federal Act). After due notice to all parties, a hearing in this matter was held in San Francisco, California, on January 5, 1979. The claimant, and employer/carrier (hereinafter referred to as respondent) were represented by counsel and were afforded a full opportunity to be heard, to adduce evidence, to call, examine and cross-examine the claimant, to make oral arguments and to submit post-hearing briefs.

Prior to the trial the parties entered into substantial stipulations (Tr. 5-6). There was agreement that the claim-

ant on July 29, 1973, sustained a 70 percent permanent partial disability to his left leg which, in the event coverage were found under the Feceral Act, would entitle him to benefits under section 8 (c)(2) of the Act at a compensation rate based on an average weekly wage of $269. 73 per week. There was a further stipulation that the claimant's injury occurred in the course and scope of his employment upon navigable waters of the United States.

Part of the facts agreed to by the parties included a stipulation that a State of California Workmen's Compensation claim was filed on February 10, 1975, under which the respondent voluntarily paid compensation to claimant for temporary total disability from July 30, 1973 until February 15, 1975, at a compensation rate of $105.00 per week, at which

time claimant reached a maximum medical improvement (Tr. 5). Thereafter payments to claimant continued from respondent at a rate of $70.00 per week under this same state workmen's compensation claim from February 15, 1975. On April 3, 1975, however, respondent filed a state form indicating it was controverting the state claim. On January 8, 1976, a stipulated award was granted to claimant by the Workers' Compensation Appeals Board of the State of California for the permanent partial disability arising out of claimant's work-related injury. (Cl. Exh. #1).

In light of the stipulations of the parties, the primary issue initially presented at the hearing was whether there was coverage under section 2(3) of the Federal Act for the injury in question. However, it was noted that in his post-trial brief respondent's counsel had not

only requested judicial notice of certain items, but had also broadened his theory of lack of coverage under the Federal Act. In this respect he alleged that the award to claimant of January 8, 1976, by the Workers' Compensation Appeals Board of the State of California for permanent partial disability of the left leg, constituted res judicata barring any further award under the Federal Act pursuant to the full faith and credit clause of Article IV, Section 1, of the U.S. Constitution. Counsel for claimant was thereafter given opportunity to file a reply brief addressing himself to the broadened coverage issue as well as the requested judicial notice (ALJ Exh. No. 1). The briefs regarding these issues have been duly considered.

Judicial Notice

As to the judicial notice requested

by respondent, it was not opposed and is taken as to the Findings and Award of the California Workers' Compensation Appeals Board of January 8, 1976, based upon stipulations of the parties of December 30, 1975, concerning claimant's injury of July 29, 1973. Evidence of this award had already been received at trial. (Cl. Exh. #1). Judicial notice is also taken of the state document entitled Stipulation With Request For Award filed with the State Appeals Board, which is marked and entered into evidence as ALJ Exh. #2.

As to the judicial notice of the street location of the employer's manufacturing and sales facility, this is also already part of the trial record. (Tr. p. 15). Judicial notice is, however, not taken as to the alleged facts that there are no navigable waters of the United States, no

marine railways, no dry docks or other construction areas above the expanded and navigable waters of the United States at this location. To take judicial notice of these alleged facts long after trial has been concluded, when claimant no longer has the opportunity to present evidence to the contrary, would violate the fundamental principles of the due process. Jordon v. Davis Construction Corp., 9 BRBS 527, 530 (1979).

Findings of Fact

Claimant began work with employer in 1968. He had an informal relationship based on friendship with the president of this company since 1958. (Tr. 24, Jt. Exh. #2, p. 3). This earlier relationship involved him in the racing of high-performance race boats owned by employer. Following his formal employment he initially was assigned to the

shipping and receiving department of employer's business operation, concerned primarily with the construction and sale of high-performance pleasure boats, including craft used for racing. After about two years, claimant became a boat salesman and manager at the same facility. In this position claimant basically was concerned with acquiring orders for the high-performance craft from customers. (Tr. 18). However, after taking an order for a new boat he would "have to watch the boat from beginning to end, so to speak, to make sure that all the options and so forth are included in the manufacture of the boat." (Tr. 19). Every boat would be inspected by him prior to delivery, not only in respect to the equipment ordered, but also to the hull construction, for possible defects. Any major repairs needed were performed by

the factory workers. On racing craft he was testing he would sometimes perform general maintenance, such as replacing fatigued parts, switches, ets. (Tr. 41).

In addition to his sales work, claimant also continued the activity of testing and racing of employer's boats from from the time of his hiring in 1968, particularly new models to determine the quality of their performance. He performed these activities over many different bodies of water nationally, although the West Coast was generally the geographical area. The purpose of the racing activities was not only to test boat performance, but also to promote sales of employer's craft. (Tr. 24). Claimant's activities in this respect, mostly on weekends, were all arranged and paid for by employer. (Tr. 21). He estimated that this promotional racing activity took place 25

to 30 "times or weekends" a year. (Tr. 21). It was in the course of one of these weekend trips that claimant on July 29, 1973, was injured when the racing boat he was operating, "Jokers Wild," an eighteen and one-half foot drag boat, apparently turned over in the Oakland Estuary, an undisputed navigable body of Water.

Conclusions of Law

Jurisdiction under the Act

The threshhold question to be addressed is the defense raised by respondent in respect to res judicata and full faith and credit under Article IV, Section 1 of the United States Constitution. In this respect I find that the doctrine of res judicata is properly applied in this matter since the application filed by claimant under the Workmens' Compensation Law of California is the same compensa-

tion claim for the same work-related injuries as that now pursued under the Federal Act, involving the same essential parties. Landry v. Carlson Mooring Service, et al. 9 BRBS 518, 521 (1979). Therefore, the crucial question to be answered is what effect an award by the Appeals Board would be accorded in the State of California. Under the full faith and credit clause of Article IV, Section 1 of the Constitution, the state award given by the Appeals Board has the same effect in federal court as it does in state court. As pointed out in Landry, supra, this principle of full faith and credit applies by statute, 28 U.S.C. §1738, to federal as well as state courts. Thus, the fact that there is a federal versus a state compensation scheme, as in the instant case, and not a state versus a state scheme is not relevant.

As pointed out in Landry, supra, however, each case must be considered on its own facts and be limited by its own set of circumstances. This would include, of course, the state law involved and the effect given under that state law to the award by the California Appeals Board.

In another relevant decision issued some nine months before Landry, supra, Thomas v. Washington Gas Light Co., 9 BRBS 760, the Board recognized that in the absence of an explicit prohibition against seeking additional or alternative relief under the laws of another jurisdiction, the granting of successive awards in different jurisdictions was valid. In Thomas v. Washington Gas Light Co., supra, reliance is place upon the case of Industrial Commission v. McCartin, 300 U.S. 622 (1947). This particular case is also discussed in Landry, supra,

at 524. In Landry, supra, the Board recognized the "decisive significance" given by the Supreme Court in the McCartin case, supra, to the state statute which provided that recovery under the Illinois statute did not preclude recovery under the statutes of other states. Such a reservation clause was not contained in the state act or in the judgment awarded by the state court in the Landry case, and the McCartin case, supra, was therefore found to be of no precedential value.

Turning to the California state statute herein involved, and the res judicata effect to be accorded to that statute, I find that this matter has been examined by the Board in an earlier decision, Ekar v. International Union of Operating Engineers, 1 BRBS 406 (1975). 1/ In that case

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1/ See also an essentially pre-'72

In a later edition of his authoritative work, Workmen's Compensation Law, §85.10 (1977), Larson also goes on to say: "It is now generally accepted that the McCartin case, in general effect, has recognized the principle of successive awards and thereby discredited the Mognolia case..." a California union official, employed by the parent organization in the District of Columbia, was murdered in California under circumstances found to have been in the course and scope of his employment.

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discussion of this problem by Authur Larson, in 45 Southern California Law Review 699 (1972). Larson generally concludes (at p. 729, et seq.) that where the sequence takes the form of state benefits followed by federal, that the case of Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962) and its progency provides strong authority for concluding that acceptance of state benefits does not constitute a binding election barring award of federal benefits. His discussion provides little assistance, however, for a post '72 amendment view of the application of the res judicata and full faith and credit doctrines.

His widow, who lived in California, filed a claim under the Workmens' Compensation statute of the state as well as in the District of Columbia, where workmen's compensation claims are administered under the Federal Act. Benefits were paid and accepted by the claimant under the California workmen's compensation statutes. She then sought her remedies under the Federal Act. The employer argued, as it does here, that the full faith and credit provisions of the U.S. Constitution required that the District of Columbia recognize as final the award made under the California workmen's compensation statute. The argument was based upon an interpretation of that statute which made the state remedy exclusive.

The pertinent provisions of the California statute which were cited by the Board, and which remained unmodified

during the periods relevant herein, read as follows:

> Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy for injury or death of an employee against an employer or against any other employee of the employer acting within the scope of his employment, except that an employee, or his dependants in the event of his death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against such other employee, as if this division did not apply, in either of the following cases:
>
> (1) Where the injury or death is proximately caused by the willful and unprovoked physical act of aggression of such other employee.
>
> (2) When the injury or death is proximately caused by the intoxication of such other employee. California Labor Code Section 3601(a), (1) and (2). (West 1974).

The Board, in examining the California provisions and the rationale of California case law cited by respondent herein, concluded that the exclusive workmen's

compensation remedy referred to acted only to preclude common law actions in California and did not contemplate the exclusion of compensation awards by other and separate compensation jurisdictions. Examination of the California state court decisions led the Board to conclude that the exclusive remedy provisions referred to above meant only that the Workmen's Compensation award was provided in lieu of permitting an election to file a state action at common law. It concluded that the California statute did not contemplate barring an employee "from subsequently seeking workmen's compensation benefits in another jurisdiction which has legitimate interest in his claim by virtue of the employer/employee relationship in effect at the time of the accident." (Emphasis supplied). In light of this state statute and the state court decisions examined by the Board, it was

found that the subsequent claim filed by the claimant in that case under the Federal Act did not conflict with the California statute and allowing the claimant to proceed did not constitute a denial of full faith and credit. On appeal to the Court of Appeals for the District of Columbia Circuit, this Board decision was affirmed, the appeals court finding that the Board was correct in its decision that the full faith and credit clause was not violated by either the extension of the District of Columbia's workmen's compensation code or the refusal to find that the California Workers' Compensation Act was the exclusive remedy for the benefits claimed. Director, Office of Workers' Comp., Etc. v. Boughman, 544 F.2d 210 (1976). The California State Court decisions and the principles established therein were examined by the Board in the

Ekar, case, supra. I find that the Board decision and its subsequent affirmance by the Court of Appeals for the District of Columbia Circuit is dispositive of the issue of full faith and credit in this case. The claim filed herein uder the Federal Act does not conflict with the California statute and allowing the claimant herein to proceed does not constitute denial of full faith and credit under the United States Constitution, in the circumstances of this case.

In respect to jurisdiction, there remains the determination of whether claimant meets the so-called status and situs tests under §§2(3) and 3(a) of the Federal Act. As to situs, I accept the stipulation of the parties that claimant's injury occurred over what is commonly known to be navigable waters of the United States, the Oakland Estuary. (Tr. 5, Jt.

Ex. #2, pps. 10-12). There remains for consideration, therefore, whether claimant meets the definition of "employee" under section 2(3), which provides in pertinent part:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net.

Prior to the decision of the Board in Sedmak v. Perini North River Associates, 9 BRBS 378 (1978), claimant's injury, occurring as it did over navigable waters, would have satisfied the status test under the earlier decision of Stewart v. Brown & Root, Inc., 7 BRBS 356 (1978). In Sedmak, supra, at p. 385, the Board concluded that injury over navigable waters in and of itself is insufficient to deter-

mine the status of maritime employment. Instead, the Board adopted the standard that ". . .a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed martime employment under section 2(3)." In this respect it is necessary to look to a claimant's overall employment, and not simply at the incident giving rise to the injury. Brown v. Reynolds Shipyard, et al., 9 BRBS 614, 617 (1979).

Examining the claimant's overall employment responsibilities, it is clear at the outset that claimant does not qualify under section 2(3) of the Federal Act as a longshoreman or as a person engaged in longshoring operations. Neither is claimant a harbor worker as that term has been defined by the Board in Stewart

v. Brown & Root, Inc., supra. I further find that claimant does not fall within the category of a ship repairman, ship-builder or ship-breaker. Claimant described his own position, at the times relevant herein, as that of a boat salesman, with duties typical of that occupation. (Tr. pps. 17, 18, 19, 25-28). It is true that claimant spent some portion of his office time, perhaps as much as 30 percent, inspecting before delivery various boars being manufactured by the employer, to ascertain, for example, that the boat contained the proper equipment as ordered by the customer, that it was the proper color and that there were no cosmetic defects on the hull. (Tr. 38). Any required adjustments were made by the workers in the plant actually working on the craft in question. (Tr. 41). I find all of these activities of the claimant

were incidental to his primary role as the salesman manager. (Tr. 26). Insofar as testing of boats was concerned, claimant testified that this was rarely done with standard models (Tr. 39) but only with new models. During the course of this testing, he would on occasion replace a fatigued part. In respect to any testing of boats the Board has held in dictum, which I find applicable to this case, that:

> We do not consider the testing of a boat by an employee of the employer to be part of vessel construction. (Napoles v. Donzi Marine, 5 BRBS, 699 (1977).

The occasional replacing of a fatigued part during this testing cannot meet the statutory definition of a repairman. Thus, claimant cannot qualify as a shipbuilder, ship-breaker or ship repairman.

Thus, for claimant to meet this "status test" it must be shown that he was engaged in some form of "maritime

employment" other than those operations expressively recognized in section 2(3). Sedmak, supra, at page 384. Claimant seeks to bring himself within this category of maritime employment by relying upon the fact that he was injured during the course of qualifying one of the employer's high-performance boats for a drag-boat race the next day, an activity which he performed on numerous previous occasions. He places his reliance on the case of Parker v. Motorboat Sales, 314 U.S. 244 (1941), a case involving a janitor who drowned while assisting another employee to test a motorboat engine. Apart from the substantial fact disparity between that case and the instant one, the Board has clearly established that pre-amendment case law is not controlling but serves only as a useful framework to ascertain maritime employment. Sedmak,

supra, at p. 387. Rather, I must examine this matter within the parameters provided by the Sedmak case, supra.

In examining the overall activities of the claimant, I must conclude that claimant's employment did not have a realistic and significant relationship to the maritime activities involving navigation and commerce over navigable waters contemplated by Congress in amending the Federal Act. It is clear from the evidence that claimant was employed by the respondent herein as a sales manager for the promotion of high-performance pleasure boats. In this work he continued to boat-racing activities in which he had participated with the respondent for ten years prior to his employment in 1968. The purpose of these racing activities was to promote boat sales (Tr. 24) as well as to allow claimant to participate in this activity for

"his own pleasure." (Jt. Exh. #2, p.5). As such, these activities were incidental to claimant's primary employment as a boat salesman and manager for respondent. As such, it does not fall within any category of "maritime employment," expressed or implied in the Act. In my opinion Congress, in acting to provide adequate workmen's compensation coverage for "maritime workers" under the Act as amended, did not have in mind protection of the claimant as he operated "Jokers Wild" in the Oakland Estuary, in preparation for a drag-boat race.

I therefore conclude from evaluating claimant's overall activities, including the incident of the boat-racing injury, that none of his activities bring him within section 2(3) of the Act, nor do they have a "realistically significant relationship to maritime activities,

including navigation and commerce over navigable waters...." Cf. Rhodes v. Healy Tibbets Construction Company, et al., 9 BRBS 605 (1979). To provide coverage to the claimant under these circumstances would be "to provide coverage to workers under the Act based solely upon injury over navigable waters without regard to their individual status." Sedmak, supra, p. 386. The Board in that case held that such a result would create an untenable situation, namely a dual standard for determination of jurisdiction; one for workers, such as claimant, injured over navigable waters, and another for workers injured shoreside.

Having failed to establish that he is an eligible empoyee under the Act, the claimant's application for benefits must be denied.

Order

The claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act filed by Lawrence Schwabenland is herewith denied.

JOSEPH A. MATERA
Administrative Law Judge

Dated: April 20, 1979
San Francisco, California

JAM:scm

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS.
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No. 82-523

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

SANGER BOATS, INC., and
TRAVELERS INSURANCE COMPANY,

Petitioners,

vs.

LAWRENCE SCHWABENLAND,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATES COURT OF APPEALS FOR
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STATEMENT OF THE CASE

Respondent substantially agrees with the statement of the case contained in the Petition filed in this action.

Respondent also concurs in the contents of

the appendices included in the Petition, and will cite to them in his argument.

SUMMARY OF ARGUMENT

Contrary to petitioners' contention, the Court of Appeals below found that respondent's employment activities fit properly into the traditional category of "shipbuilder." Respondent clearly satisfies the "status" requirement under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Therefore, there is no need for this Court to explore the scope of either the status requirement or the term "maritime employment" in this case.

The Court of Appeals properly found that the LHWCA applies to the recreational boating industry. The resulting decision comports with a prior ruling of this Court, and is in harmony with the only other circuit to have decided the issue. In opposition to this position, petitioners offer only an ambiguous Congressional Record excerpt and an inapposite citation to the LHWCA.

Finally, the Court of Appeals properly refused to decide whether respondent was exempt from LHWCA coverage in that he may have been "the master or member of of a crew" of a vessel. This issue was not timely raised during prior administrative proceedings, and should not be raised for the first time on appeal.

ARGUMENT

I

THE FINDINGS BELOW AS TO RESPONDENT'S EMPLOYMENT STATUS DO NOT CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT

Petitioners claim, at Page 12 of their Petition, that the holding herein by the Ninth Circuit Court of Appeals "virtually eliminates the status requirement" of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901 to 950, and therefore conflicts with the decisions in P.C. Pfeiffer Company, Inc. v. Ford, 444 U.S. 69 (1979) and Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249

(1977). Such claims are inaccurate, and do not merit the granting of a Writ of Certiorari.

The Court of Appeals, far from eliminating the status requirement, made a specific finding that respondent Lawrence Schwabenland's job duties constituted maritime employment:

> It is undisputed that Schwabenland conducted visual inspections of boats under construction to make certain that they were in compliance with the orders received. The inspection duties, the testing of new models to evaluate their design, and the performance of occasional maintenance in connection with the testing activities would seem to be sufficiently related to the construction of the vessels to constitute maritime employment covered under the Act. Ninth Circuit Court of Appeals Opinion, Petitioners' Appendix A, Page 10.

Petitioners confuse the issue somewhat, at Page 13 of their Petition, by stating that respondent's "activities are not of the type traditionally performed by longshoremen." While this may be true, this Court has recognized that the LHWCA covers, in addition to the longshoreman, the "harbor worker, ship repairman, shipbuilder, [and] shipbreaker."

Northeast Marine Terminal Co. v. Caputo, supra, at Page 273. As found by the Court of Appeals, respondent's activities fit properly into the traditional category of "shipbuilder." Therefore, there is no need for this Court to address petitioners' questions at Pages 13 and 14 as to the scope of the term "maritime employment."

Insofar as the Court of Appeals herein utilized the status test in reaching its decision, that decision does not conflict with the decisions in either Pfeiffer or Caputo.

II

APPLICATION OF THE LHWCA TO THE RECREATIONAL BOATING INDUSTRY IS NOT NEGATED BY EITHER CONGRESSIONAL INTENT OR BY CASE LAW

Petitioners next assert that the Court of Appeals below erred in holding that the LHWCA applies to the recreational boat industry. In support of their position, they first cite, at Page 16 of their Petition, an ambiguous excerpt from the Congressional Record.

They further rely upon the "eighteen tons net exclusion" of the LHWCA. However, that exclusion is not a general exclusion of all work on or related to small vessels. Instead, it applies only to "any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. § 903(a)(1) (emphasis added). The exclusion is only for the specified circumstances of hiring, as recognized in Continental Casualty Co. v. Lawson, 64 F.2d 802, 805 (5th Cir. 1933): it was intended only to prevent the "master" of a small vessel from exposing its owner, whose investment is relatively small, to the substantial liability imposed by the LHWCA, without the owner's consent.

It is apparent that petitioners have done nothing to undercut the implication of Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), that the LHWCA applies to the recreational boating industry. In addition, the Court of Appeals' decision below not only does not

conflict with any decision of this Court, but is in complete harmony with the only other circuit which has squarely faced this issue. See Mississippi Coast Marine v. Bosarge, 637 F.2d 994, 998-1000, modified in part, 657 F.2d 665 (5th Cir. 1981).

III

THE ISSUE OF RESPONDENT'S POSSIBLE STATUS AS THE "MASTER OR MEMBER OF A CREW" OF A VESSEL WAS NOT TIMELY RAISED BELOW, AND CANNOT BE RAISED ON APPEAL

Petitioners are attempting, at the appeal stage, to introduce the issue of whether respondent was "the master or member of a crew" of a vessel and therefore not covered by the LHWCA. See Ninth Circuit Court of Appeals Opinion, Petitioners' Appendix A, Page 6.

The Court of Appeals refused to consider this issue, in that it had not been timely raised in prior administrative proceedings. See Parker v. Motor Boat Sales, Inc., 314

U.S. 244, 251 (1941).

Petitioners now argue, at Pages 20 to 21 of their Petition, that their prior failure to raise the issue is moot, since there is "no reason to believe" that the issue would have been addressed by the initial trier of fact. Such an argument is untenable, and supposes foreknowledge by petitioners of the decisions of the lower tribunals. Not surprisingly, petitioners cite no authority in support of their position.

CONCLUSION

Based on the foregoing, respondent Lawrence Schwabenland respectfully submits that the Writ of Certiorari sought by petitioners should be denied.

Respectfully submitted,

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LAWRENCE SCHWABENLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a recreational boat salesman who was injured while testing a racing boat on navigable waters was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-523

SANGER BOATS, INC., ET AL., PETITIONERS

v.

LAWRENCE SCHWABENLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 683 F.2d 309. The opinion of the Benefits Review Board (Pet. App. 18-60) is reported at 13 Ben. Rev. Bd. Serv. (MB) 22. The decision and order of the administrative law judge (Pet. App. 61-88) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1982. The petition for a writ of certiorari was filed on September 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Sanger Boats, Inc., is a manufacturer of high performance recreational and racing boats. Respondent Lawrence Schwabenland was employed by Sanger as a sales

manager (Pet. App. 2). In addition to routine sales duties, however, Schwabenland inspected boats during the course of production, test drove prototypes of new model boats, and performed occasional maintenance on the boats he tested (*id.* at 2-3, 68-69). He also participated in approximately 30 boat races a year to promote Sanger boats (*id.* at 3, 69-70). On July 29, 1973, Schwabenland was test driving one of Sanger's racing boats on the Oakland Estuary, in preparation for a drag boat race, when the boat flipped over, injuring his left leg (*id.* at 3, 21, 62-63).

Schwabenland filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. IV) 901 *et seq.* Petitioners contested the claim, asserting, inter alia, that Schwabenland was not "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3).[1] After a hearing, an administrative law judge ("ALJ") held that Schwabenland's employment "did not have a realistic and significant relationship to the maritime activities involving navigation and commerce over navigable waters" (Pet. App. 85). The ALJ concluded that Schwabenland's inspection, maintenance and testing activities were only incidental to his sales duties and were therefore insufficient to qualify him as a shipbuilder or ship repairman under the statute (*id.* at 82-83). For similar reasons, the ALJ rejected Schwabenland's contention that his regular participation in boat races on behalf of his employer was "maritime employment" within the meaning of Section 2(3) of the Act (Pet. App. 83-87).

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[1]The Act also requires that an injury occur upon a situs defined by Section 3(a), 33 U.S.C. 903(a). Petitioners do not dispute that the injury here occurred on a covered situs.

Both Schwabenland and the Director, Office of Workers' Compensation Programs, appealed to the Benefits Review Board pursuant to 33 U.S.C. 921(b)(3). The Board affirmed the judge's decision by a 2-1 vote (Pet. App. 50, 54, 60). At the outset, the Board rejected the employer's contention, raised for the first time on appeal, that the recreational boat industry as a whole is excluded from the reach of the Act (*id.* at 22-42). The Board, however, affirmed (*id.* at 44) the ALJ's denial of benefits on the ground that Schwabenland did not spend a "substantial portion" of his time engaged in maritime activities.

The Board declared that the overall nature of a claimant's duties determines coverage under the Act (Pet. App. 44). See *Boudloche* v. *Howard Trucking Co.*, 11 Ben. Rev. Bd. Serv. (MB) 687 (1979), rev'd, 632 F.2d 1346 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981). The Board concluded that Schwabenland's involvement in the inspection of boats and testing of new models did not qualify him as a shipbuilder (Pet. App. 44-47), and the remainder of his "arguably maritime" (*id.* at 49) activities did not occupy a "substantial portion" of his time (*ibid.*). The Board therefore denied coverage even though the original Act, prior to its amendment in 1972, had been applied to the death of a land-based janitor who drowned while going for a test ride in one of his employer's motorboats (*id.* at 42-43). *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

Both Schwabenland and the Director petitioned for review of the Board's decision in the court of appeals pursuant to 33 U.S.C. 921(c). The court granted the petitions and reversed the Board (Pet. App. 17). The court concluded that Schwabenland was engaged in "maritime employment" within the meaning of the Act because his work possessed a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on

navigable waters' " (*id.* at 8; *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976), quoting *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 272 (1972)). The court noted that Schwabenland's "inspection duties, the testing of new models to evaluate their design, and the performance of occasional maintenance in connection with the testing activities would seem to be sufficiently related to the construction of the vessels to constitute maritime employment covered under the Act" (Pet. App. 10).

The court joined two other circuits in rejecting the Board's "substantial portion" test (Pet. App. 11-13). The "substantial portion" test, in the court's view (*id.* at 11-12), is inconsistent with the letter and spirit of this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), which upheld coverage for employees so long as they spent "some of their time" engaged in maritime employment. The court also rejected (Pet. App. 14-17) petitioners' claim that the recreational boat industry is excluded from the reach of the Act, relying on the clear language of the statute and the decision of this Court in *Parker* v. *Motor Boat Sales, Inc., supra*. Lastly, the court refused to consider petitioners' claim, raised for the first time on appeal, that Schwabenland was not covered because of the Act's statutory exclusion of the "master or member of a crew" of a vessel (Pet. App. 6 n.1). See 33 U.S.C. 902(3) and 903(a)(1).

ARGUMENT

Petitioners' principal contention is that the court of appeals has effectively ignored the "status" requirement found in Section 2(3) of the Act, 33 U.S.C. 902(3), because Schwabenland's duties were "only tangentially maritime in nature" (Pet. 13). The court of appeals, however, reached its contrary conclusion by applying the narrow "realistically significant relationship to traditional maritime activity" test

announced in *Weyerhaeuser Co.* v. *Gilmore, supra.* Far from eliminating the status requirement, as petitioners contend, this test is impermissibly restrictive inasmuch as it excludes some employees working on actual navigable waters. See *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (argued Oct. 4, 1982). Because the finding of coverage in this case is justified even under the restrictive "traditional maritime activity" test, and because the result below does not conflict with the decision of any other court, no further review is warranted.

1. Schwabenland was engaged in "maritime employment" under the amended Act because his injury occurred on actual navigable waters. See 81-897 Pet. Br. 18-28.[2] In *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941), this Court found coverage when the janitor of a recreational boating store drowned during a test ride in one of his employer's motorboats. Despite the fact that the janitor was "predominantly a non-maritime employee" and had never previously gone on the water in the course of his duties, this Court allowed the award, noting that "habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that *clearly maritime activity* that the award was here made" (314 U.S. at 247; footnote omitted; emphasis added).

As fully discussed in the Director's brief in *Director, OWCP* v. *Perini North River Associates, supra*, Congress moved the coverage of the Act shoreward in 1972 to include workers who were injured on the new, broadly defined situs of the Act. 33 U.S.C. 903(a). The indisputable congressional purpose behind the 1972 amendments was to expand

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[2]We are serving counsel for the other parties with copies of the Director's brief in *Perini*.

coverage "to protect *additional workers.*" S. Rep. No. 92-1125, 92d Cong., 2d Sess. 1 (1972) (emphasis added). The definition of covered employees under amended Section 2(3) "does not exclude * * * employees traditionally covered * * *." *Id.* at 16. Consequently, since *Parker* v. *Motor Boat Sales, Inc., supra,* established that even an employee's occasional ride in a motorboat on navigable waters is maritime employment, it follows a fortiori that an employee such as Schwabenland, who regularly piloted a small boat on navigable waters and who was injured while doing so, is covered by the amended Act. The result reached by the court of appeals thus falls squarely within the test the Director has urged in *Perini.*

2. Even if the court below correctly utilized the narrower coverage test challenged in *Perini,* its decision is plainly correct. Under that test, coverage is established if an employee's duties have "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.' " *Weyerhaeuser Co.* v. *Gilmore, supra,* 528 F.2d at 961, quoting *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249, 272 (1972) (Pet. App. 8). Schwabenland's employment meets this test for two independent reasons.

First, piloting a vessel in navigable waters is a quintessentially maritime activity. This Court declared in *Parker* v. *Motor Boat Sales, Inc., supra,* 314 U.S. at 247, that riding in a boat on a navigable river is "clearly maritime." Moreover, this Court has only recently held that a collision between two recreational boats bears a sufficient relationship to traditional maritime activity to fall within federal admiralty jurisdiction, even though the boats had never

been used for commercial purposes. *Foremost Insurance Co.* v. *Richardson*, No. 80-2134 (June 23, 1982), slip op. 6.[3] Schwabenland regularly piloted his employer's boats on navigable waters, both in testing prototype models and in drag boat races, all for the commercial purpose of promoting his employer's business. In view of this Court's decisions in *Parker* v. *Motor Boat Sales, Inc.*, *supra*, and *Foremost Insurance Co.* v. *Richardson, supra*, the conclusion is inescapable that such activity has a significant relationship to traditional maritime activity.

Alternatively, Schwabenland meets the "navigation or commerce" test for the reason given by the court below—Schwabenland was closely involved with the construction of motorboats intended for use on navigable waters. He spent 30% of his working time inspecting boats in various stages of production (Pet. App. 2). In addition, he test-piloted prototypes of new model boats and occasionally performed maintenance work in the course of that activity (*id.* at 2-3). Such duties are "sufficiently related to the construction of the vessels to constitute maritime employment covered under the Act" (*id.* at 10).

Thus, petitioners' contention (Pet. 12) that the decision below "virtually eliminates the status requirement" of the LHWCA is plainly mistaken. Schwabenland's employment activities bore far more than a tangential relationship to traditional maritime activity. Whether the narrow test applied by the court below or the broader criterion urged by the Director in *Perini* is appropriate for determining coverage under the Act, it is evident that Schwabenland meets the "status" test of Section 2(3). In light of the fact that the

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[3] *Foremost Insurance* applied the precise *Executive Jet* test used by the court below. *Foremost Insurance Co. v. Richardson, supra*, slip op. 6.

result below does not conflict with the decision of any other court of appeals, there is no need to subject this case to further review.[4]

3. Petitioners' second contention (Pet. 15-18) is that the recreational boat industry as a whole is excluded from the Act. Both the court of appeals (Pet. App. 17) and the Benefits Review Board correctly rejected this argument and there is no contrary authority among the other courts of appeals.

The Act contains no explicit exclusion for the recreational boat industry, either as originally enacted or after the 1972 amendments. To infer such an exclusion, petitioners rely on a brief exchange between Representatives Graham and Abernethy during consideration of the original Act (68 Cong. Rec. 5403 (1927); Pet. 16). The 1927 Act, however, used a situs test as the exclusive means of establishing coverage, and the cited exchange is merely a discussion of the definitional reach of the term "dry dock" (see Pet. App. 29). The exchange does not suggest any congressional conclusion that certain employees were to be excluded solely because their employer dealt with recreational boats. On

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[4]Although petitioners do not specifically raise the issue here, they implicitly urge that the Benefits Review Board's "substantial portion" test should control the outcome of this case. The "substantial portion" test, however, is inconsistent with this Court's decisions in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 & n.18 (1979), and *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), and it has been rejected by every other court of appeals that has considered it. *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 343-344 (1st Cir. 1981); *Boudloche* v. *Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981). See also *Garvey Grain Co.* v. *Director, OWCP*, 639 F.2d 366 (7th Cir. 1981); *Dravo Corp.* v. *OSHRC*, 613 F.2d 1227, 1233 n.9 (3d Cir. 1980). This issue, therefore, is no more appropriate for review than the questions raised directly by petitioners.

the contrary, if a worker in the recreational boat industry happened to be injured while at work on the water, he unquestionably would have been covered under the original Act.

Equally unavailing is petitioners' reliance (Pet. 17) on the Act's limited exclusion for certain employees working with vessels under 18 tons net. See 33 U.S.C. 902(3), 903(a)(1). That provision excludes these employees only when the master engages them to unload, load or repair such a small vessel. *Mississippi Coast Marine, Inc.* v. *Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981); *Continental Casualty Co.* v. *Lawson*, 64 F.2d 802, 805 (5th Cir. 1933). Contrary to petitioners' suggestion, the existence of such a limited and explicit exclusion is strong evidence of congressional intent not to exclude other categories of workers dealing with small boats, such as employees in the recreational boat industry. *Mississippi Coast Marine, Inc.* v. *Bosarge, supra*, 637 F.2d at 999.

Nor can a contrary inference be drawn from the congressional consideration of the 1972 amendments to the LHWCA. While it appears that the recreational boat industry did not participate in the hearings on those amendments, that failure is not attributable to any deliberate exclusion of that industry from the coverage of the Act, as suggested by petitioners (Pet. 17). Given this Court's 1941 decision in *Parker* v. *Motor Boat Sales, Inc., supra*, which applied the Act to a motorboat dealer, and the clear purpose of Congress in 1972 to extend, rather than contract, the coverage of the Act, it is simply unreasonable to infer an exemption for the recreational boat industry merely because the industry was not mentioned during the 1972 debates. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

4. Petitioners' last contention, that Schwabenland was excluded from coverage as the "master or member of a crew of any vessel," 33 U.S.C. 902(3) and 903(a)(1), comes too late, since this issue was raised for the first time in the court of appeals. Under this Court's ruling in *Parker* v. *Motor Boat Sales, Inc., supra*, 314 U.S. at 251, such tardiness is fatal to the claim. Petitioners' request (Pet. 21) for a remand on this issue must also be rejected, because granting this request would defeat the purpose of the rule that requires prompt presentation of such contentions. In any event, the contention is meritless. Schwabenland is not excluded from the Act on this basis because he lacks the requisite continuing and permanent connection with the vessel he was piloting at the time of his injury. See *Zientek* v. *Reading Co.*, 220 F.2d 183, 185 (3d Cir.), cert. denied, 350 U.S. 846 (1955); *Maryland Casualty Co.* v. *Lawson*, 94 F.2d 190, 192 (5th Cir. 1938).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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